Standard Motor Products, Inc. *and* **Daniel Whittle** *and* **Charles Stallions.** Cases 15-CA-8331 and 15-CA-8417

November 24, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 13, 1982, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel and Respondent, respectively, filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Standard Motor Products, Inc., Montgomery, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as modified below:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Edgar Lee Hayes on September 22, 1981, and notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 612, or any other labor organization by discriminatorily discharging, or in any other manner discriminating against, employees with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT publish, maintain, or enforce any rule of conduct which unlawfully limits the rights of our employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer full and immediate reinstatement to Edgar Lee Hayes to his former job, or, if such job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any losses which he suffered by reason of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the discharge of Edgar Lee Hayes on September 22, 1981, and we will notify him in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against him.

STANDARD MOTOR PRODUCTS, INC.

[1] We note the following scrivener-type errors made by the Administrative Law Judge and excepted to by Respondent: in sec. II,B,3, first paragraph, fifth sentence, the word "ever" should read "never"; in sec. II,E, penultimate paragraph, second sentence, the word "down" should read "shown"; and in the section entitled "Conclusions of Law," the sixth paragraph should read, "Respondent did not violate Section 8(a)(3) and (1) of the Act in the discharge of Daniel Whittle and Charles Stallions."

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

As requested by the General Counsel, we have modified the Order and notice recommended by the Administrative Law Judge to include provisions requiring Respondent to expunge from its files any reference to the unlawful September 22, 1981, discharge of Edgar Lee Hayes and to notify Hayes in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against him. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard at Montgomery, Alabama, on February 24 and 25 and March 12, 1982. The charge was filed in Case 15-CA-8331 on September 25, 1981,[1] by Daniel Whittle, an individual, herein called Whittle, and the complaint in that matter issued on October 26 alleging that Standard Motor Products, Inc., herein called Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, in the discharge of Whittle and employee Edgar Lee Hayes, on September 22. The charge in Case 15-CA-8417 was filed by Charles Stallions, an individual, herein called Stallions, on December 14, amended January 11, 1982, and the complaint in the case issued on January 21, 1982, alleging that Respondent violated Section 8(a)(3) and (1) of the Act in the imposition of more onerous work assignments on Stallions on November 12 and terminating Stallions on December 9. The complaint in each case also alleges certain individual acts by Respondent violative of Section 8(a)(1) of the Act. An order consolidating the cases for hearing issued on January 21, 1982.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation licensed to do business in the State of Alabama where it is engaged in the business of warehousing and distributing of automotive parts. Respondent operates a warehouse at Montgomery, Alabama, which is the only facility involved in this proceeding. During the 12-month period prior to issuance of the complaint Respondent received at its Montgomery, Alabama, facility goods and materials valued in excess of $50,000 directy from points located outside the State of Alabama. The foregoing facts which are admitted by Respondent meet the Board's jurisdictional standards and I find that Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint alleges, and at the hearing Respondent stipulated, that Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 612, herein called the Union, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act. I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

According to the testimony of Stallions, which was uncontradicted in this regard, the union activity among Respondent's employees began about August 25 when Stallions along with Edgar Hayes sought out a union to organize Respondent's employees. On September 10, they met with the Union and received authorization cards to be passed out among Respondent's employees. Stallions also testified without contradiction that he signed a card himself and secured other employees' signatures on authorization cards. On September 14, he passed out union leaflets to employees who were reporting to work. It is undisputed that on September 14 the Union telegraphed Respondent that Stallions, Hayes and three other employees, Freddie Irving, John Graham, and Mickey Williams[2] were engaged in an organizing campaign at the Company on behalf of the Union. Subsequently, Hayes was discharged on September 22 while Stallions was discharged on December 9. The third alleged discriminatee, Dan Whittle, like Hayes, was discharged on September 22. The details of each discharge will be set forth below following treatment of the alleged independent violations of Section 8(a)(1) of the Act. Plant Manager Tom Cunningham also testified that he had received information that the names of Graham and Williams had also been used without their knowledge or permission.

B. *The Alleged Independent 8(a)(1) Violations*

1. Respondent's rules

The complaint in the first numbered case alleges that Respondent promulgated in April, and continuously maintained and enforced thereafter, the following rules:

> 18. Employees must not engage in any nonjob related activities during working hours without permission from their supervisor. Violators will be discharged.
>
> * * * * *
>
> 29. Any employee making false, vicious or malicious statements concerning an employee, the management, the company or its works will be discharged.[3]

It is the General Counsel's contention that the above rules constituted overly broad no-solicitation rules which inherently interfered with the Section 7 rights of employees to engage in mutual aid and support. Respondent admits that the above rules have been maintained by it at all material times. The uncontradicted evidence also shows that the rules were republished and distributed to certain employees on August 8.[4]

In *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1980), the Board reaffirmed its position that an employer rule prohibiting, without further clarification, employees from engaging in solicitation during working hours is presumptively invalid. The presumption may be rebutted, however. In the instant case, notwithstanding the complaint allegation that the rules were enforced, there is no evidence that the rules related above

[1] All dates are in 1981, unless otherwise stated.

[2] Irving, presented as a witness by Respondent, testified that her name was used in the telegram without her authorization or knowledge.

[3] Jt. Exh. 1.

[4] Jt. Exh. 2.

were enforced so as to prohibit employees from soliciting during their breaktime, lunchtime, or other free time during regular working hours without prior permission. On the other hand, Plant Manager Tom Cunningham testified without contradiction that the rules which were originally published in April 1980, when the facility was opened for business, were not strictly enforced with respect to the no-solicitation rule, and that it was his practice in going over Respondent's rules with new employees to tell them that breaks were their own time and they could do what they wanted during breaks and lunch periods. With respect to the rule regarding false statements, Cunningham testified, again without contradiction, that the rule was not applied or enforced against any kind of union talk. Cunningham's testimony in the foregoing respects was not rebutted by any General Counsel witness and there was no evidence in the record to establish that the rule was in any way disparately applied or to establish that any employee was under the impression that he could not engage in union activity during the lunch periods or breaktime. On the contrary, Whittle, called by the General Counsel, testified that "everybody" understood that breaks were their own free time. Stallions also confirmed his understanding that breaktime and lunchtime were free of restrictions relative to union solicitations.

Cunningham's testimony regarding the no-solicitation rules was delivered in a believable and convincing manner. His claim that he explained to employees the extent of the no-solicitation rule was not only uncontradicted, but also appears to have been supported by the General Counsel witnesses, Whittle and Stallions. Finally, there was no evidence the no-solicitation rule was, in fact, applied to restrict employees' solicitation to times other than when they were properly required to be performing their assigned work tasks. Accordingly, I credit Cunningham's testimony on this point, and I conclude that Respondent has rebutted the presumption of invalidity of the no-solicitation rule arising by virtue of the reference therein to "working hours," by properly orally clarifying to employees the extent of application of the rule. I therefore find no violation of the Act in Respondent's maintenance of the rule as clarified.

The rule regarding false statements by employees stands on a different footing. The Board has held that rules substantially similar to Respondent's rule 29 are not simply presumptively violative of the Act, but are violative *per se* because the utterance of inadvertent or unknowingly false statements by employees in the context of concerted activity under the Act is protected. *St. Joseph Hospital Corporation*, 260 NLRB 691 (1982), citing *American Cast Iron Pipe Company*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). Moreover, Respondent's rule 29 is also overly broad because it is facially applicable to not only nonworking time, but also to statements made while off Respondent's property. *Id.* Accordingly, I find that Respondent's maintenance of its rule 29 violates Section 8(a)(1) of the Act.

2. Alleged statements of Cunningham

A number of instances of 8(a)(1) violations alleged in the complaint were attributed to Respondent's representatives by the testimony of Stallions. Stallions related that around 11 a.m. on September 14 he was called into Cunningham's office where Cunningham told him that he was aware that Stallions with a group of others was organizing a union at the Company. Cunningham added, Stallions testified, that he wished that they had come to him personally, and that they would "regret" it. Stallions' response was that he wished that Cunningham would not take it personally, and it was not intended to be personally against him. Stallions could recall nothing further of the conversation.

Plant Manager Cunningham admitted that he had a meeting with Stallions but placed it a day or so after the Union's telegram. He added that the meeting was at Stallions' request. Stallions, according to Cunningham, complained that Cunningham was attempting to get Stallions' father-in-law fired by another employer because of Stallions' union activities. Cunningham reported he denied the accusation and testified he avoided talking to Stallions about the Union. Moreover, Cunningham related that he could not recall making any comment to Stallions regarding the wish that Stallions had come to him first rather than the Union, and he emphatically denied that he ever told Stallions that he or the employees would regret going to the Union.

Stallions reported that Cunningham called him into his office again on September 16 to tell him that he and Billy W. Stanfield, his supervisor, were to cut out their horseplaying and stop card playing and the football board. In this meeting, according to Stallions, Cunningham stated that he had proposed a wage scale to New York (Respondent's home office) and that the situation that existed at the plant would "alter those circumstances" to take effect on January 1. Cunningham added that he could foresee some layoffs, Stallions testified. While Stallions said there was some other talk about other things he related nothing further about that conversation.

Cunningham denied the remarks attributed to him by Stallions and testified that he made no comments at all concerning wage increases to Stallions.

The General Counsel relies on Stallions' testimony in the foregoing respects to establish the complaint allegations that Cunningham unlawfully threatened to delay pay raises for employees and to lay off employees because of their union activities.

Stallions further testified that on the morning of September 24 he met Cunningham at or around 10:30 or 11 a.m. In that meeting with Cunningham, Stallions asked Cunningham if he would be next to be discharged in view of the discharge of Whittle and Hayes. Cunningham responded, Stallions testified, that he guaranteed Stallions that he would not be fired before the election, but that pending the outcome of the election he could not guarantee him anything. Cunningham denied the remark attributed to him by Stallions. The General Counsel contends that the foregoing establishes the complaint allegation that Respondent impliedly threatened an employee with discharge by informing the employee that

his continued employment was dependent upon the outcome of the union election.[5]

Considering all the foregoing testimony of Stallions, it is clear such testimony is irreconcilable with that of Cunningham. I found Cunningham more credible in demeanor as a witness. His denials of the remarks attributed to him were unequivocal and persuasive. He exhibited generally good recall of events and he expressed his recollections without hesitation. His explanations of the meetings with, and remarks to, Stallions were not illogical or implausible and were expressed with a sincerity that clearly supported his credibility. Cunningham's assertion that he specifically avoided talking to Stallions about the Union was particularly convincing. It was also logical that Cunningham would seek to avoid discussions regarding the Union with a known union supporter who had been identified as such through the Union's own telegram to Respondent. It is improbable that Cunningham would make coercive remarks regarding the Union to Stallions, a known union adherent, and not to other employees. Yet, aside from unlawful interrogation attributed to him by Hayes, another known union adherent and an individual who cannot be considered as wholly impartial, no other employee attributed to Cunningham any coercive remarks. Weighing the foregoing against Stallions' testimony, his demeanor, his obvious pecuniary interest in the outcome of the proceeding, his rather selective memory,[6] and my feel for the record as a whole, I find Cunningham far more credible. Accordingly, I credit Cunningham's denials and explanations regarding the remarks attributed to him by Stallions. I find no violations of Section 8(a)(1) of the Act by Respondent based on Stallions' testimony.

The complaint also alleges that on May 11 Respondent interrogated an employee concerning the employees' union activities and beliefs. This allegation is based upon the testimony of employee Hayes and grows out of Hayes' employment interview with Cunningham on or about May 11. Hayes testified that he had previously worked for a freight line where he had been represented by a union. In the preemployment interview, according to Hayes, Cunningham in reviewing Hayes' application allegedly remarked, "I see that you worked for the Teamsters before." Hayes acknowledged that he had and then, according to Hayes, Cunningham asked him if he would sign "a card" if anybody approached him. Hayes responded negatively. That was all that was said on that point according to Hayes.

Cunningham denied questioning Hayes about whether he would sign a union card if approached. He conceded, however, that he had a conversation with Hayes concerning his application and specifically he had observed on the application that Hayes had received a rather large hourly pay rate at his previous employer, and admitted that he assumed that Hayes had been working at a firm where employees were represented by a union. He asked Hayes how he would feel about working for substantially less wages than he had received working for the prior employer. At that point Hayes indicated that those were "contract wages" at the previous employer and Cunningham then expressed concern that Hayes was just looking for a "stop gap job" and might not be satisfied working for Respondent. Hayes had responded that his wife also worked and there would be no problem. Cunningham specifically denied that he asked Hayes how he would respond if he were approached about the Union, and he further denied any questions whatsoever to Hayes about a union.

I credit Cunningham's version of the interview with Hayes. Cunningham's testimony on this point was not only clear and unequivocal, but also reasonable and logical. It is also consistent with Hayes' application for employment[7] which made no reference to Hayes' union membership. Moreover, Hayes appeared less positive generally in his testimony and was clearly less convincing. Furthermore, if Cunningham had been concerned regarding Hayes' potential as a union supporter at Respondent's place of business sufficient to prompt or motivate the question attributed to Cunningham by Hayes, it is more than likely given the antiunion motivation attributed to Respondent in the 8(a)(3) discharges herein that Respondent would not have hired Hayes to begin with. Accordingly, I find that Cunningham did not question Hayes as Hayes alleged, and I therefore find no unlawful interrogation as alleged in the complaint regarding this incident.

3. Alleged statements of Stanfield

Stallions also testified regarding some remarks alleged in the complaint as coercive and attributed to his supervisor, Billy Stanfield. Thus, in support of the complaint allegation that Stanfield threatened a layoff or plant closure because of the union activity, Stallions testified that around September 22 he talked to Stanfield in the returns department where Stanfield was supervisor, and Stanfield told him that the Union was going to cause layoffs and would cause the same thing that happened in the San Francisco plant, that it would close down and possibly move. Stallions responded that it was just another scare tactic of the Company. He could recall nothing further regarding the conversation which was witnessed, according to Stallions, by employee Freddie Irving. Stanfield in his testimony denied making such remarks to Stallions and denied further that Respondent ever had a plant in San Francisco or in California. Irving, called as a witness by Respondent, testified that she had never heard anything about layoffs or shutdown of a San Francisco plant.

Although not specifically alleged as an independent violation of the Act, Stallions testified that on September 23 Stanfield talked to him in Stanfield's office where

[5] The complaint allegation on this point alleges that the incident occurred on October 5 rather than September 24 as Stallions testified. The record relects no explanation for the difference in dates.

[6] It is noteworthy that while Stallions, a staunch union supporter who was well aware of the discharge of Hayes and Whittle (and the alleged unlawfulness of it), apparently did not reveal to Board investigators any coercive remarks by Cunningham until after his own discharge in December. It appears that the discharge prompted the recollections upon which the General Counsel had based the independent 8(a)(1) allegations contained in the complaint in Case 15-CA-8417 and attributed to Cunningham on dates prior to the discharge of Hayes and Whittle.

[7] Resp. Exh. 12.

Stanfield told him that Cunningham and the office personnel were watching Stallions on the monitors and that he was standing around talking "union." Stanfield added, according to Stallions, that they were putting a lot of pressure on Stanfield to fire Stallions and that this could not be tolerated. Stanfield told Stallions that he was telling him that to help protect his job. There were no witnesses to his conversation, according to Stallions.

Stanfield denied the remarks attributed to him by Stallions about Stallions being observed. On the other hand, Stanfield testified that he had chastised Stallions once for having walked away from his work area and going to Stanfield's office where employees Pam Ray and Freddie Irving were working. When Stanfield asked him what he was doing there, Stallions replied that he was "just talking." Stanfield told him that as long as he had work to do to go to his own worktable and do it. Stallions' response, according to Stanfield, was, "Well, it won't be long until the union will be in here and I'll have a specific job to do, and I'll know exactly what I'm going to do and when I'm going to do it." Stanfield repeated his direction that Stallions get on back to his worktable. Stallions responded, "Well, we know what you make a year; what Mr. Cunningham makes a year; what Speer makes a year; and we know what the Company made last year." Stanfield answered that he did not care what Stallions knew but if he had proof of the matter and brought it in the next day Stanfied would give him 10 minutes to get up on a table and preach his "fucking Union." Stanfield's testimony with respect to his matter was generally corroborated by Irving.

Stallions also testified in support of a complaint allegation of unlawful interrogation by Stanfield that, on November 10, 11, and 12, Stanfield questioned him several times about which way the election was going.[8] Specifically, Stanfield asked him if he thought the Union would win the election and Stallions told him yes. Stanfield also had inquired as to whether Stanfield's name had come up at union meetings. On November 11, Stanfield allegedly told Stallions that he saw many people going to Cunningham's office and they were telling Cunningham that they were all for the Company. Stanfield then observed that the same people were coming out and talking to Stallions and telling him that they were all for the Union. Stanfield inquired whether with that kind of "back stabbing" Stallions thought the Union would win.

Finally, Stallions related in his testimony that on the day of the election he was called into Stanfield's office where he found Pam Ray, Freddie Irving, and Stanfield. Stanfield said that he called him there because Freddie and Pam had some questions. They asked him whether or not Stanfield had made some kind of deal with Stallions. Stallions denied that he made a deal. He was then asked (apparently by Irving or Ray) how he was going to vote and he said that he was still going to vote for the Union. Stallions could recall nothing further about the conversation.

Stanfield denied in his testimony the remarks attributed to him by Stallions or any questions of Stallions regarding the outcome of the election or the union campaign. While he acknowledged that he did call Stallions into his office on one occasion in the presence of Pam Ray and Freddie Irving, he said that that was because of reports made to him by Ray and Irving to the effect that Stallions was implying to them that Stanfield was relating to Stallions everything that Irving and Ray were telling Stanfield in confidence. Stanfield denied that he had been doing so and called Stallions in to confront him. Stanfield told Stallions in the presence of Irving and Ray to tell them what Stanfield had supposedly told Stallions outside. He said that Stallions equivocated. Finally, Stanfield told Stallions in the presence of the other two employees that he did not want him lying anymore. Stanfield's testimony in this regard is corroborated by Irving, while Pamela Ray testified she was not questioned regarding this incident.

From the foregoing, it is obvious that the testimony of Stallions is at odds with the testimony of Stanfield and Irving. Stallions was not corroborated in any respect regarding the comments he had attributed to Stanfield. Not only was Stallions' testimony self-serving, but also it was lacking in conviction. Finally, his testimony on other points discussed below were specifically contradicted by other credible employee witnesses rendering his total testimony suspect and unreliable. On the other hand, the denials of Stanfield of the remarks attributed to him were emphatic and expressed with clear conviction. Stanfield further impressed me as a very candid witness. Stanfield's denials of any threat of plant closure as in the case of Respondent's San Francisco plant is particularly convincing in view of the absence of evidence that Respondent ever maintained a place of business in San Francisco or even in California. I conclude Stallions' testimony on this point was pure fabrication. Irving's testimony where it corroborated Stanfield's was also expressed with conviction and without equivocation. At times she even displayed indignation over Stallions' conduct. Accordingly, on balance I credit Stanfield and Irving wherever their testimony contradicts Stallions'. I therefore find no violations of Section 8(a)(1) based upon Stallions' testimony regarding remarks attributed to Stanfield.

C. *The Discharge of Hayes*

Hayes was employed by Respondent about May 12 and worked as a material handler and subsequently as an aisleman. Hayes became involved in activity on behalf of the Union around the end of August. He solicited union authorization cards and on one occasion passed out leaflets to employees as they reported to work through the back door of the plant. However, his leafletting activity took place about a week subsequent to September 14, the date of the Union's telegram advising Respondent of Hayes' participation in union activity. Hayes was discharged on September 22.

Hayes related that at some time prior to his discharge he learned from Stallions that someone had written a letter to get Cunningham fired. Hayes decided to telephone Cunningham at his home one evening, and warn

[8] The election was held on November 13.

him of the alleged existence of the letter.[9] It was Hayes' further testimony that during his telephonic conversation with Cunningham the subject of the Union was raised and Cunningham asked Hayes who was involved in the Union. Hayes allegedly responded that he would not "sell anybody short." Hayes was vague with respect to how the subject of union arose in the conversation and testified he "felt like" Cunningham started the talk about the Union. There was further discussion about things that the Union could and could not do and Hayes expressed his views in favor of the Union. Hayes was very vague with respect to the details of the alleged conversation with Cunningham.

Cunningham, in his testimony, admitted that Hayes had telephoned him and placed it in the evening of the same day that he had received the telegram from the Union. In his version, Cunningham testified that Hayes mentioned a letter from two of Cunningham's supervisors demanding that Cunningham resign. Cunningham admittedly inquired of Hayes who was behind the letter and Hayes ultimately responded that it was Supervisor Stanfield and Johnny Graham, an individual who was not a supervisor and who had been named in the Union's telegram as being engaged in organizing efforts. Cunningham admittedly asked Hayes why they would write the letter, but Hayes could shed no light on the matter. According to Cunningham, no such letter was ever received by the Company. Cunningham denied asking Hayes who was behind the union activity or any questions of that nature.

The complaint alleges, and the General Counsel argues, that Cunningham unlawfully interrogated Hayes. I find Cunningham's version of the telephone conversation with Hayes more convincing than Hayes' vague testimony as to the contents of that conversation. I conclude that Cunningham's questions were limited to ascertaining who was behind the letter seeking to have him fired. Accordingly, I find no unlawful interrogation in Cunningham's remarks to Hayes.

The details of Hayes' discharge are not in significant dispute. It appears that, on the morning of September 22, Cunningham was stopped in the plant area by employee Bobby Dean who began to ask Cunningham questions about the Union. Those questions led into a general conversation regarding the subject which, from time to time, drew other participants including Supervisors Jeff Speer and Stanfield and Hayes. Hayes testified that he was in and out of the conversation and at one point in the discussion he disputed an assertion by Cunningham that if employees went on strike the Company could bring in a new crew and work them. Cunningham then asserted that Hayes had been lying to the people. Hayes testified that he then responded that he was not sure what the law read and that he would check into it and find out. Hayes added that Cunningham pointed out that he had been especially good to Hayes in letting him have time off.[10] Cunningham, also in the discussion, according to Hayes, implied that union pay scales were absurd.

Hayes related that the conversation ended just prior to the third break[11] and he and Bobby Dean went on break. Hayes claimed he did not have an assigned break and took any of the three breaks he cared to. Hayes added that he went to the break room where he got a Coke and then went to use the telephone which employees were authorized to using during break periods. After using the telephone and waiting for a return call, Cunningham and Supervisor Speer walked up to him and Cunningham told Hayes that he was fired for taking an illegal break and using the telephone while not on break.

While Respondent conceded that it fired Hayes for taking an illegal break, it disputes his claim that he had no assigned break period. In this regard, Warehouse Supervisor Jeff Speer testified that he had specifically discussed Hayes' break period with him and assigned him to the first break. In addition, Speer had posted a notice[12] regarding the break schedule effective September 1 which assigned the first break to one aisleman (Hayes' position) and the second break to the two aislemen. No aisleman was scheduled for the third break.

Employee Bobby Dean, called by Respondent, disputed Hayes' assertion that Dean had taken a break after the discussion with Cunningham. Dean testified that he did not take a break that morning because he had spent his breaktime talking to Cunningham. Dean related that the conversation with Cunningham began 10 or 15 minutes before the first break period and continued until the beginning of the third break period. When the first break bell rang, Cunningham asked Dean if he were going to take a break but Dean had opted to remain talking with Cunningham. Stanfield joined the conversation at or about the time the second break bell rang. Hayes had joined the discussion with Cunningham a few minutes after it started and remained for the entire conversation according to Dean.

Cunningham's version of the discussion corroborates that of Dean. More specifically, Cunningham testified that the conversation actually broke up when Hayes, apparently offended at a remark of Stanfield, called him a "big motherfucker." This brought a rebuke from Cunningham who told Hayes that he did not want that kind of talk, and particularly did not want it directed to any of his supervisors. He added that he did not want to hear of a situation in which Hayes showed disrespect or insubordination to any supervisor at that facility again or he would fire Hayes. This apparently served to stiffle further discussion and the conversation broke up. Cunningham testified that, when the first break bell rang, he indicated to the employees that they could take their breaks at that time but since nobody responded he assumed it was not their breaktime. He was uncertain

[9] Hayes testified with considerable uncertainty about the date of the telephone call to Cunningham, and said he could not be sure whether it occurred before or after the Union's September telegram to Respondent.

[10] Hayes had admittedly had a poor attendance record while employed by Respondent.

[11] Respondent authorized three separate 10-minute break periods each morning to avoid overcrowding of its break facilities and to insure that some work is continued during break periods. Thus, employees were assigned to specific break periods and took their breaks in accord with that assignment.

[12] Resp. Exh. 4.

whether he made the same offer when the second break bell rang.

Shortly after the conversation broke up, Speer approached Cunningham and asked if he had told Hayes that he could take a break at that point. Cunningham said that he had not and Speer then related that Hayes was using the telephone. At that point Cunningham approached Hayes who stated that he was taking a break. When Cunningham asked if Hayes was not aware that this was not his breaktime Hayes just shrugged his shoulders. Cunningham terminated Hayes for taking an improper break. Cunningham asserted in his testimony that Hayes had made an effort to flaunt company rules in front of Cunningham in such a way that Cunningham had no alternative but to discharge him. Cunningham conceded, however, that there had been no prior discharges by Respondent of any employees for taking an improper break. On the other hand, there was no evidence that there had been any prior violations of the break rules.

The General Counsel argues that Hayes' involvement in union activity, Respondent's knowledge of that involvement, the timing of the discharge within a week of acquisition of such knowledge, and the absence of valid justification, when coupled with Respondent's admitted opposition to organization by its employees establish that Hayes' discharge was because of his union activities. I concur that the General Counsel has clearly established a *prima facie* case of a violation of Section 8(a)(3) of the Act in the discharge of Hayes based on the circumstances he enumerated. The taking of an improper or out of order break on a single occasion is, on its face, a rather flimsy excuse for discharging an employee and serves to impugn the asserted basis for the discharge. The gravity of the punishment greatly outweighs the offense particularly when one considers that Respondent had been so lenient with Hayes in a far more serious problem, his absenteeism, prior to his involvement in union activity.

Under the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the General Counsel having established a *prima facie* case of a violation, the burden shifts to Respondent to establish that Hayes would have been discharged in any event. I am persuaded that it has not carried that burden here. There was no evidence that any employee was discharged or even reprimanded for the same offense as Hayes prior to Hayes' discharge.

One employee, Stallions, was reprimanded for taking an improper break subsequent to Hayes' discharge as discussed *infra*. Even that action, however, demonstrates disparate treatment in Hayes' case. Respondent attempted to explain the obvious difference in treatment accorded Stallions on the basis that a reasonable basis for doubt existed as to whether Stallions understood instructions regarding his appropriate breaktime. Thus, Respondent had given Stallions the benefit of the doubt while it denied the same benefit to Hayes even though, notwithstanding specific instructions with respect to his breaktime, there existed a basis for doubt as to whether Hayes, by virtue of his discussions with Cunningham and Dean, knowingly forewent the taking of a break.

Certainly, there was no showing that Hayes' taking of a third break either caused overcrowding of the break facilities or caused a disruption of work. In this regard, from Respondent's own break schedule, it is to be observed that no other aislemen were scheduled to take the third break, so the aisleman was not completely unattended because of Hayes' taking of the third break period.

Most revealing as to Respondent's motivation in Hayes' discharge was Cunningham's further explanation of the difference in the treatment accorded Stallions. Thus, Cunningham frankly testified:

> So, there was a substantial difference between the two. In one case, Hayes was coming across to me as just flaunting this in my face, this is what I can do and this is what the Union can do, and once we're in you're not going to be able to stop us doing whatever we want to do.

This testimony related not to Hayes' taking the break so much as it related to Cunningham's conclusions with respect to Hayes' remarks in the earlier conversation between Dean and Cunningham. Hayes was not given any "benefit of the doubt" as to the appropriateness of his taking the break because, I conclude, he had angered Cunningham with what he had said about the Union in the prior conversation. At the time of his discharge, Hayes had said nothing additional to provoke Cunningham. Hayes' remarks about the Union in the prior conversation, even if wrong, were clearly protected so long as such remarks were not malicious or willful. *American Cast Iron Pipe Company, supra.*

Respondent argues that, if it had been inclined to discharge Hayes for union considerations, it would have done so when he directed the obscenity to Stanfield. Beyond the fact that Hayes may have been still under the umbrella of the Act's protection at the time he made the remark by virtue of its occurrence in a frank if not heated union discussion, the fact remains, as Dean's credible testimony has it, that Hayes apologized for the remark. Under such circumstances, including the fact that Stanfield himself had used vulgarity in the discussion,[13] no valid basis for a discharge existed.

Considering all the foregoing, it is clear, and I conclude, that Cunningham clearly associated Hayes' taking of an improper break with Hayes' staunch union support, and discharged him accordingly. I therefore find that Respondent has failed in its burden shifted to it under *Wright Line* principles to establish that Hayes would have been discharged even if he had not been a strong union supporter. It follows, and I conclude, that, in discharging Hayes, Respondent violated Section 8(a)(3) and (1) of the Act.

[13] Cunningham testified that Stanfield had, in describing Respondent's benevolent attitude to employees, noted in the discussion that Respondent had given a "break" to Hayes once when he had come to work "all fucked up," allegedly due to a medication overdose.

D. *The Discharge of Daniel Whittle*

Whittle was initially employed by the Company in May 1980 and worked until his discharge on September 22, 1981, except for a brief break in his employment in February when he voluntarily quit for a short while. Whittle worked as an order filler and became active in the Union's organizational campaign. In this regard, he signed a union authorization card and testified that beginning roughly in the second week of September he began to talk to employees regarding the Union at lunchtime and on breaks. In addition, he related that he attended the first union meeting which was held on September 9.

Whittle testified that on September 22 he observed a notice on the employee bulletin board to the effect that if employees disagreed with union organization to call a number which was listed in the notice. Subsequently, Whittle was told that the number that was posted was the telephone number of Paul Ledger, another employee. Whittle testified that he concluded that he would call the number, but when he went back to the bulletin board to copy the number the notice had been removed. Accordingly, that afternoon when he got off work he observed employee Ledger clocking out ahead of him. He followed Ledger outside asking him for his telephone number and Ledger, Whittle testified, told him to "kill his ass." Whittle proceeded to follow Ledger out to his car and attempted to continue his questions of Ledger about the telephone number in the presence of other employees Dean Dassel, Stallions, and William Bolling. During the encounter with Ledger, employee Bolling, who had a plate in his hand, told Ledger that he was going to hit him with the plate. Also Stallions, according to Whittle, had to be restrained physically from trying to get some papers out of Ledger's hand.[14]

The encounter ended, Whittle testified, when Plant Manager Cunningham hurried out to the group and asked Ledger if he had been threatened by Whittle. Ledger responded affirmatively and was supported by Dassel. While Whittle denied making any threat to Ledger, no one else present at the site at the time supported him. Cunningham then fired Whittle on the spot. Whittle additionally testified that as he walked back toward the plant with Cunningham he asked Cunningham why other people who did reprehensible things were not disciplined and Cunningham allegedly replied, "Things are different now."

On March 29, still according to Whittle, he returned to the plant to talk to Cunningham and to ask for his job back. Whittle testified that Cunningham told him he would like to give him his job back but that the lawyers in New York had the case and they were concerned because Hayes' and Whittle's names were on the same charge. The conversation ended with Whittle saying that he would get back in touch with Cunningham the next morning. However, when he telephoned Cunningham the next day, Cunningham reported that he had not been in touch with New York. Whittle had no contact with Cunningham subsequently.

[14] Whittle's testimony in the foregoing respects was corroborated by that of Stallions and Bolling.

Whittle denied that he ever threatened to bash Ledger's head in. He further denied that he had raised his fist to Ledger or made any threatening motion or pointing motion with his finger to Ledger's face. He admitted, however, that Stallions' having to be restrained created quite a scene. Whittle conceded Ledger was nervous during the encounter and that Ledger was easily scared. Nevertheless, Whittle maintained that, although he weighed 210 to 215 pounds compared to Ledger's smaller frame, he did nothing other than ask Ledger for his telephone number. Whittle's testimony in the foregoing respect was generally corroborated by Stallions, Bolling, and employee Henry Hinkle who also claimed to be present. More specifically, Bolling admitted that he told Ledger that he was going to hit him over the head with the plate, but he testified the comment was not serious, and Ledger did not view it as serious. According to Bolling, all Whittle did was ask Ledger for his telephone number. However, Bolling admitted that at one point he told Whittle to "cool it" or words to that effect. He explained that he gave that admonition because of "the way everybody was crowding around the car and everything."

Stallions, in his testimony, admitted that he had tried to get the papers out of Ledger's hand and he admits that somebody, probably Bolling, held him back. Stallions denied hearing any threat by Whittle to Ledger.

Hinkle related in his testimony that he did not hear any threats of violence from anybody during the parking lot encounter. And, while he observed that Stallions did have to be restrained, he did not hear Bolling say anything to Ledger or Whittle. When Cunningham came out to the group he stated, "Dan, you're fired because you are behind all this mess." Cunningham's remark in this regard is strikingly similar to another remark that Hinkle testified he heard Cunningham make to Supervisor Jeff Speer on the afternoon of September 16. In this regard, Hinkle testified that he overheard Cunningham tell Speer, "I believe Dan is behind all this mess." Hinkle overheard no further remarks and was unable to put Cunningham's alleged remark in context.

Hinkle also testified that on the day following Whittle's discharge he told Cunningham that Whittle had not threatened Ledger. He added that subsequently Cunningham told him that Cunningham had ascertained that Whittle did not threaten Ledger and would like to bring him back but it was a Jewish holiday and he could not contact his boss.

The testimony of Respondent's witnesses contrasts sharply with that of the General Counsel's witnesses. Thus, Paul Ledger testified that on his way to the parking lot Whittle started following him and telling him, "I'm going to knock your fucking head off." At Ledger's car Whittle started pointing his finger in Ledger's face and telling him, "I'm going to knock your fucking head off and break your motherfucking neck." Ledger identified employee Hank Hoffmon, Dassel, Bolling, and Stallions as being present. While Ledger said that Bolling made a remark about hitting Ledger in the head with a plate, Ledger said he did not regard that as a threat because he and Bolling worked together and in the past

had been able to say things to each other without offending each other. He described Bolling as a fairly decent friend. Ledger testified that, when Cunningham asked Ledger if he had been threatened, Ledger told Cunningham what happened. Dassel supported Ledger's version and Cunningham fired Whittle. Dassel, as Respondent's witness, generally corroborated Ledger's testimony.

Janice Stanfield, who is employed by Respondent as an office clerical, testified for Respondent that she was shutting down the terminal and closing the blinds on the windows when she noticed "a lot of confusion" in the parking lot. She observed Ledger at his car with his hands on top of the car and Dan Whittle swinging his fist in Ledger's face. She said Ledger appeared very "agitated." She therefore called out to Cunningham and told him Ledger was being "hassled" out in the parking lot. At that point, Cunningham hurried out to the scene.

Cunningham testified that when he arrived at Ledger's car he asked what was going on and if Ledger were being threatened. Ledger responded that Whittle had threatened him but Whittle denied it. Dassel reported that Whittle had said that he was going to knock Paul's head or something to that effect. Cunningham said that he observed another employee, Willie Smith, nearby, but, when he glanced at Smith, Smith acted as if he did not see anything. He asked Whittle if what Dassel has said was true and Whittle denied it. Cunningham then responded by saying that he had Janice Stanfield saying that she had observed him "hassling" Ledger, that Ledger had said he uttered a threat, and that Dassel said that he had threatened to knock Ledger's head off. He said under those circumstances he was firing Whittle. Cunningham admitted that on the way back to the plant Whittle said something about other employees breaking company regulations and Cunningham responded that that was a different situation from what they had there. On the day of his discharge, Cunningham prepared a termination slip for Whittle stating, "Employee threatened another employee with bodily harm while on company property in front of witnesses."[15]

Cunningham testified without contradiction that, later in the afternoon of September 22, Bolling telephoned him and asked whether Whittle could be reinstated if he apologized to Ledger. Cunningham said no, but told Bolling if he wanted to talk about it further to come to Cunningham's office the next day. He did talk to Bolling the next day and at this time Bolling admitted that he had threatened to hit Ledger with a plate. However, Bolling claimed that Ledger did not take it seriously since they always joked around. Bolling further related, according to Cunningham, that there had been other witnesses, so Cunningham said that he would interview the others to see what happened. Cunningham did talk to others, most of whom denied having heard or seen anything specific. On the other hand, employee Pam Cripple specifically told Cunningham that she had heard Whittle make a threat to Ledger as he was following him out to his car. Cunningham concluded that Whittle had in fact threatened Ledger in a serious tone which could be distinguished from Bolling's threat which Ledger admittedly did not take seriously.

Cunningham admitted that Whittle came back to see him a few days later and continued to assert his innocence of any threats. Further, he admittedly told Whittle that he hated to fire him because he was a good employee who he had once hired back but things were different because he had not just quit, he had threatened an employee with bodily violence on company property. Cunningham specifically denied saying anything to Whittle about conferring with company lawyers in New York. He further denied ever implying to Whittle that he would not be hired because of the union situation nor did he imply or state that Whittle could not be hired because he was connected with Hayes in the same charge which had been filed against Respondent.

As is readily apparent from the foregoing, there is a considerable credibility conflict between the witnesses with respect to whether or not Whittle issued a threat of any kind to Ledger. Resolving such conflicts requires the weighing of equally plausible stories by apparently sincere witnesses who have different perceptions of events they have witnessed. Such perception is naturally affected by the interest of the individual witness. Minor variations of perceptions can be expected and even variations in the identification of other witnesses to the event as present here is not unusual. In resolving conflicts in such situations there is always a significant chance of an error by the trier of fact.

Considering the record as a whole, I conclude that the single witness to Whittle's threats who was most likely not to have any position or particular interest to preserve and therefore most likely to be most disinterested was Pam Cripple. Pam Cripple, who admittedly was not present during the entire encounter between Ledger and Whittle, testified that, as she was leaving the plant and walking into the parking lot, Whittle was "harassing" Ledger about a telephone number and she heard Whittle at one point when she was walking about 6 feet to the side of Ledger tell Ledger that he was going to "knock his fucking head off." She also testified she heard Ledger tell Whittle that he was not even going to talk to Whittle. Pam Cripple proceeded to her car and immediately left the area.

Cripple was not only unlikely to be biased, but I also found Cripple most convincing and sincere in demeanor. Moreover, it is clear that Whittle, as well as Stallions for that matter, was motivated in the encounter with Ledger by an apparent change of heart by Ledger with respect to the union organization campaign,[16] and Ledger's efforts to get other employees to withdraw their union authorization cards. Under these conditions, it is not likely that Whittle was simply asking Ledger for a telephone number. Moreover, it is unlikely that a simple request for a telephone number would have provoked the state of fright which Whittle concedes was exhibited by Ledger.

[15] Resp. Exh. 11.

[16] Whittle testified that 38 of Respondent's 38 employees had signed union authorization cards. If this is true, and there is no evidence to contradict it, the testimony of all of Respondent's employee witnesses cannot necessarily be dismissed as simply biased and motivated in their testimony by antiunion considerations.

Accordingly, in view of the threat heard by Pam Cripple whom I credit, and considering the circumstances as a whole, and also because Ledger and Dassel impressed me as sincere and honest, I credit the testimony of Ledger and Dassel over that of Whittle and the other General Counsel witnesses with respect to the threats made at Ledger's car. Accordingly, I conclude that cause existed for Whittle's discharge.

Whittle's denials of the threats to Ledger, which I have discredited, in effect colors the remainder of his testimony with respect to remarks he attributed to Cunningham. Accordingly, and because I found Cunningham to be a frank and convincing witness, I credit Cunningham's denials of the specific remarks attributed to him by Whittle.

Since I find the facts to be contrary to facts upon which the General Counsel relies to establish the violations in Whittle's discharge, I conclude that the General Counsel has not made a *prima facie* showing sufficient to support the conclusion that protected conduct was a "motivating factor" in Respondent's discharge of Whittle as required under the Board's principles more recently enunciated in *Wright Line, supra*. Moreover, in this regard, I conclude, as Respondent's brief argues, the record does not support a finding that Respondent was aware of Whittle's union activities or inclinations, or even that the encounter between Ledger and Whittle was related to union matters.

I specifically discredit that testimony of Hinkle and Bolling upon which the General Counsel relies to establish Respondent's knowledge or belief of Whittle's sympathies. Hinkle's testimony regarding overhearing Cunningham's September 16 reference to Whittle as being "behind this mess" has already been recited. I find Hinkle's testimony patently incredible. His hearing was too selective to be believable. His recollection of the date of the statement, so positive on direct examination, was shaken on cross-examination. The impression created while testifying that Hinkle was simply repeating a story prepared for him received support from the oddly similar testimony of Bolling. Thus, Bolling testified that he overheard Cunningham on September 16 tell Speer near Cunningham's office, "Dan and Cowboy [Stallions] are the ringleaders." This could not have been the same remark overheard by Hinkle because Hinkle said he heard it in the work area. Although Bolling initially placed the time as September 16, the same date Hinkle claimed to have heard the similar remark, he subsequently conceded that it could have been after Whittle's discharge. The similarity in the alleged remark attributed to Cunningham by both Hinkle and Bolling, their initial claims that the remarks took place on the same day, their inability to place the remarks in any sort of context, and the improbability that such similar remarks attributed to Cunningham would be repeated to the same person, Speer, in two different areas of the plant, give the testimony of Hinkle and Bolling the ring of pure fabrication. I therefore do not credit either of them wherever either are contradicted by other witnesses herein.

This leaves nothing to establish Respondent's knowledge of Whittle's union sympathies or activities except for the possible application of the Board's small plant doctrine. However, as Respondent's brief points out, the Board has held that the small size of an employer's plant does not warrant a finding of knowledge of union activities of specific employees absent supporting evidence showing that the union activities were carried out in such a manner or at such times as to compel a finding that the employer in the normal course of events must have noticed them. See *Hadley Manufacturing Corporation*, 108 NLRB 1641, 1650 (1954); *Ralston Purina Company*, 166 NLRB 566 (1967). Here, while Respondent employed only 38 unit employees, there is no supporting evidence to show that Whittle's activities were carried out at such places and times that Respondent must have noticed them. Accordingly, I find Respondent had no knowledge of Whittle's union sympathies. In view of the absence of such knowledge and due to my finding of cause for the discharge, I find that Whittle's discharge did not violate Section 8(a)(3) and (1) of the Act. I shall therefore recommend that the 8(a)(3) and (1) allegations of the complaint relative to Whittle's discharge be dismissed.

E. *The Alleged Discriminatory Work Assignments and Discharge of Stallions*

Stallions began work for Respondent in June and generally worked in the re-box department under the supervision of Stanfield. The fact that Stallions became active in the union campaign as well as the fact that he was named in the Union's telegram to Respondent on September 14 as having been involved in such activities has already been set forth. Stallions continued in his union activity and served as a union observer during the NLRB-conducted election. The General Counsel alleges that Respondent imposed more onerous work assignments on Stallions from November 12 to on or about December 9 when Stallions was discharged by Respondent. It is further alleged that the more onerous work assignments were imposed because of Stallions' union activity and that his discharge was prompted by such activity.

With respect to the alleged unlawful work assignments, Stallions testified that on the day prior to the election he was assigned to work outside the plant washing down the parking lot, sweeping it, and painting white lines on it. That assignment was contrary to his normal assignment in the return department where he went over returned parts to ascertain whether they were defective, and, if defective, to throw them away. His work on the parking lot continued through November 13 and after that date he continued to receive assignments to work outside the plant, cutting weeds and grass, after which he was assigned to dig out a drainage ditch, a task which he claimed took 2 days. Thereafter, he continued to receive outside work assignments cutting trees and grass and working in flower beds. On December 7, he was transferred back into the plant where he was assigned to loading and unloading trucks, and sorting out parts.

Respondent denies that Stallions was assigned to more onerous work, although it concedes that except for the tree cutting he was assigned to do the outdoor work he

testified about. However, Stanfield and Cunningham both testified that the assignment of employees to outside work was not without precedent, and each pointed out that even Stallions had been assigned to outside work earlier in the summer. In fact, Stanfield testified without specific contradiction that in July and August Stallions did 80 to 85 percent of all the outside work at the plant. Furthermore, Stanfield testified that he himself had done some of the outside work painting yellow lines in the parking lot and running a weed eater.

Respondent further contends that several employees had been assigned to do outside work from time to time, and Stanfield in his testimony named a number of employees who had been so assigned. Most of this work was assigned during the preceding summer when work was slow and employees were given the option to go outside and work or go home. On the other hand, Stanfield related that the bulk of the more recent outside work was done around the time of the sales convention that Respondent held in Montgomery in December. In this connection, Cunningham explained that the convention began on December 13 and drew approximately 100 attendants. Because a number of visitors from outside the area could be expected to visit the plant during the convention, Cunningham gave instructions to do as much cleanup and spruce up work outside the building as possible. Employee Pamela Ray testified in support of Cunningham that it was generally known by the employees that Respondent was trying to spruce up the place in preparation for the convention.

Finally, Stanfield testified that back during the summer Stallions had told him that the preferred to work outside. That testimony receives corroboration from the testimony of Pamela Ray who said Stallions once told her that he did not mind doing outside work, and that he enjoyed the sunshine and being outside.

In arguing that Stallions' outside work assignments were discriminatory, the General Counsel points to the timing of the assignments right around the election, the arduous nature of the work outside, and Respondent's union animus. That Stallions was assigned outside work which was not his regular duty is not disputed. There is little, however, in the record to show that such assignments were actually more arduous than his regular assignments. With respect to cutting grass, the record reflects that he used a riding mower. Only the digging of the ditch would appear to have presented a more difficult task than normally peformed by Stallions.[17] There is no evidence which would indicate that Stallions' outside work was made more onerous due to weather conditions. Moreover, consistent with the testimony of Stanfield and Ray, whom I have credited, I conclude that Stallions enjoyed the outside work. This conclusion is substantiated by the fact that Stallions at no time protested or in any way raised objections to Stanfield or any supervisor about his outside assignments. Accordingly, I conclude the record does not establish that such outside assignments of Stallions were more onerous.

Moreover, the absence of discrimination in the outside assigments to Stallions is supported by the reasonable necessity for the work to be performed; i.e., because of the sales convention. Further, the assignment of other employees to do portions of the outside work, even though to a lesser degree than Stallions, in preparation for the convention, also reflects the absence of discrimination. I therefore conclude that the General Counsel has not established the required preponderance of evidence to show that the assignments of Stallions to the outside work was violative of Section 8(a)(3) and (1) of the Act.

Turning to the discharge of Stallions, Respondent asserts that Stallions was discharged on December 9 for spitting tobacco juice on the warehouse floor in violation of a company rule. Based upon Stallions' denial of having chewed or spit tobacco at all on the afternoon of December 9, the General Counsel argues that Respondent's asserted grounds for the discharge is nonexistent and that he would not have been discharged but for his union or protected activities.

Stallions testified that at 4:20 p.m. on December 9 as he was leaving the restroom area he was approached by Supervisor Stanfield who read him the rule in the plant about spitting on the floor,[18] pointed to the floor, and said there was few drops there and Stallions could hit the "damn clock." While Stallions admitted he had been chewing tobacco the morning he was discharged he denied that he was chewing tobacco anytime after lunch that day. Moreover, he claimed that he had continually chewed tobacco since becoming employed. While he had been aware of the rule against spitting on the floor, he testified that he had been told by Cunningham that it was "OK" to chew tobacco as long as one either spit in a box or spit in a can. Therefore, Stallions testified that he carried a little box around with him for this purpose.

In direct contradiction of Stallions, Stanfield testified that he approached Stallions on the afternoon of his discharge regarding a work problem. As he was talking to Stallions he observed Stallions chewing tobacco and, while he watched, Stallions turned his head, "worked a big gob of spit in his mouth," spat on the floor, and turned back to look directly at Stanfield. While there was a box in the vicinity which may have been Stallions' target, it was Stanfield's testimony that he hit the floor. Stanfield without saying anything to Stallions went to employee Pamela Ray and directed her to go to talk to Stallions and observe that he was chewing tobacco. Stanfield then went into the office and related what had transpired to Cunningham. Cunningham asked if there were anything in Stallions' file regarding his chewing tobacco. Stanfield replied affirmatively referring to a July 10 warning which had been issued to Stallions to the effect that chewing tobacco was against company policy.[19] A

[17] Although Stallions' testimony indicated in effect that he dug a "new" ditch, and it took 2 days, Stanfield testified that the assignment took a major part of only 1 day and involved not the digging out of a new ditch but the cleaning out of an old one. I find Stanfield's testimony more credible than Stallions' who, I believe, tended to exaggerate. I accept Stanfield's testimony where it differs from Stallions'.

[18] Respondent's applicable rule states: "Spitting on the floor is one of the most unsanitary habits. Any employee apprehended will be discharged. This especially applies to chewing tobacco." Jt. Exh. I, rule 27.

[19] Stanfield further testified that leadman Johnny Graham had once complained about Stallions' chewing but since Graham was not a supervisor and since Stanfield had not personally seen Stallions chewing in the

Continued

decision was then made to discharge Stallions so Stanfield removed a copy of the Company's rules signed by Stallions when he was employed, took them to Stallions, and read them to him and then discharged him. According to Stanfield, Stallions still had tobacco in his mouth at the time of the discharge. Pamela Ray testified for Respondent in support of Stanfield's testimony that at Stanfield's direction she had gone to observe Stallions on December 9 and had ascertained that he was chewing tobacco. Furthermore, she observed him spit once in her presence. However, on that occasion, he spat into a box.

In assessing Stallions' general credibility and in evaluating Respondent's motivation in his discharge, it is necessary to allude to other incidents which provoked written disciplinary action against Stallions by Respondent. The first was on November 19 when Cunningham issued a written warning to Stallions for threatening other employees with loss of their jobs and telling them that people in the plant would make it hard on them if they did not sign a union card. Stallions denied having engaged in such conduct and refused to sign the disciplinary action form. His denial was contradicted at the hearing by the testimony of Charlotte Smith who testified that, following her employment on November 9, Stallions asked her to sign a union authorization card and she refused. Stallions then told her that when the Union came in it was more than likely that if she did not join she would not keep her job very long. Smith reported the matter to Cunningham. Smith's testimony was clear and she impressed me as being sincere. I credit her testimony over Stallions.

Stallions received another writeup dated December 8 for having taken an authorization break. Stallions refused to sign the warning at first but then proceeded to sign under Cunningham's threat to discharge him for insubordination if he did not sign. It appears that on December 7 upon returning to work in the plant following the outside assignments he worked in a "class 4" position outside his old work area. Stallions took his break with employees in the new area. But according to Stanfield, whom I credit, the following day, December 8, Stallions was assigned to checking overstock in another area, yet took the same break he had taken the day before. Since there may have been some legitimate confusion in Stallions' mind about which break he should have taken, Respondent decided not to discharge him and instead only issued the written warning to him. The December 8 warning to Stallions was not alleged to be discriminatory nor was discrimination in this regard argued in the General Counsel's brief.

There was substantial record testimony tending to establish that Stallions was involved both before and after his discharge in a mysterious campaign to embrass Cunningham or have him fired. This campaign involved the circulation of rumors about the resignation of Cunningham and subsequently the initiation of a poster campaign seeking to have Cunningham fired. While these matters may be related to Stallions' credibility since he denied any involvement in such a campaign, I find it unnecessary to treat them in detail in this Decision. It is sufficient to observe that I find Cunningham, Stanfield, and Ray more convincing and credible than Stallions. Accordingly, I accept their testimony with respect to the facts surrounding Stallions' discharge on December 9.

Stallions' known union involvement makes his discharge suspect. The suspicion is increased by the fact that he was the second of the five people named in the Union's September 14 telegram as being involved in union activity who was discharged. The three remaining employees named in that telegram, according to Cunningham, had indicated that their names were contained in the telegram without their authorization, thereby suggesting their lack of support for the Union's campaign. Thus, the two most active union adherents, Hayes and Stallions, were discharged by Respondent. This circumstance, coupled with the unlawful discharge of Hayes which I have already found, establishes, in my view, the General Counsel's *prima facie* violation of Section 8(a)(3) and (1) in Stallions' discharge. It therefore becomes Respondent's burden to show, under these circumstances, that it would have fired Stallions notwithstanding his union involvement. I am satisfied that Respondent has met its burden in this regard. On the credited testimony of Respondent's witnesses, I have found that cause existed for Stallions' discharge; i.e., spitting on the floor of the warehouse. While there is no evidence that other employees had been discharged for this offense, it is quite clear that it was a dischargeable offense under Respondent's rules and Stallions was clearly aware of the rules.

The absence of any prior discharges for infraction of the rule against spitting on the floor does not support an inference of discrimination here where there is no evidence of any prior violations. Stallions himself had once been warned by Stanfield in an excessively broad application of Respondent's rule not to chew tobacco in the warehouse. Although that warning must be considered as an invalid application of the rule, it occurred prior to any union activity by Stallions and cannot be considered as discriminatorily motivated. It does serve, however, to reflect Stanfield's sensitivity to the chewing of tobacco in the warehouse and decreases the likelihood that Stanfield's reaction to Stallions' spitting on the floor was motivated by Stallions' union activity. Moreover, Stanfield's reaction is even more understandable since, I find, Stallions' spitting on the floor in Stanfield's presence makes such action viewable as open defiance. Stallions' denial which I had discredited that he was chewing tobacco at all at the time precludes a determination that his spitting was an act of inadvertence, that his failure to hit an appropriate receptacle was accidental, or that some other ameliorating circumstance existed.

I am not so naive as to believe that Respondent was not happy to be relieved of Stallions' employment because of his prior union activity. But, as the Board said in *B. G. Berland Paint City, Inc.*, 199 NLRB 927 at 928 (1972):

> The mere fact that an employer may want to part company with an employee whose union activities have made him *persona non grata* does not *per se* establish that a subsequent discharge of that employee

plant he made no note in Stallions' record of the matter. Stanfield added that he had seen Stallions chew tobacco several times outside the plant while working outside, but that was not contrary to any rules.

> must be unlawfully discriminatory. If the employee himself obliges his employer by providing a valid independent reason for the discharge, i.e.—by engaging in conduct for which he would have been discharged anyway—it cannot properly be labeled pretext and ruled unlawful.

See also *Golden Nugget, Inc.*, 215 NLRB 50 (1974); *Klate Holt Company, et al.*, 161 NLRB 1606 (1966).

Here Stallions committed a dischargeable offense under Respondent's rules. No ameliorating or mitigating circumstances were drawn. No evidence of disparate application of the rules with respect to this offense was shown. And Stallions had even been warned previously about chewing tobacco inside the warehouse.

Under the circumstances, I conclude that Stanfield's conclusion that Stallions' action was an act of defiance was an honest one and the discharge justifiable. Accordingly, I conclude that Stallions would have been discharged even in the absence of his union activity. It follows, and I conclude, that Stallions' discharge did not violate Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By publishing, maintaining, or enforcing a rule of conduct for employees which unlawfully limits the rights of employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discharging its employee Edgar Lee Hayes, thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did violate Section 8(a)(3) and (1) of the Act in the discharges of Daniel Whittle and Charles Stallions.
7. Respondent has not violated Section 8(a)(1) of the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Since I found that Respondent discriminatorily discharged Edgar Lee Hayes, it will be recommended that Respondent be ordered to offer him immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered from the time of his suspension to the date of Respondent's offer of reinstatement. The backpay for said employees is to be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Standard Motor Products, Inc., Montgomery, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Publishing, maintaining, or enforcing any rule of conduct where it unlawfully limits the rights of employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment.

(b) Discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 612, or any other labor organization, by discriminatorily discharging employees, or in any other manner discriminating against them with regard to their hire and tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Edgar Lee Hayes immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Montgomery, Alabama, place of business copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."